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No. 83-2057

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Under the facts of this case, is reversal compelled because the prosecution did not provide defense counsel at trial with discovery which might prove relevant in evaluating the credibility of prosecution witnesses?

2. Under the facts of this case, was the petitioner's Sixth Amendment right to compulsory process violated when proposed defense witnesses asserted their Fifth Amendment privilege against self-incrimination, purportedly as a result of threats made by the prosecution?

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BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

On April 19, 1984 the California Supreme Court denied petitioner's original petition for writ of habeas corpus in case number 23573 without an opinion. (Appen. A.)

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JURISDICTION

Petitioner invokes jurisdiction of this Court under 28 U.S.C. section 1257(3). (Petn., p. 3.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions relied upon by petitioner are set out at pages 3 through 4 of the petition. Those provisions relied upon by respondent are set forth in Appendix B.

STATEMENT OF THE CASE

A. Proceedings in State Court

On March 19, 1982 following a month-long jury trial in San Diego County Superior Court, petitioner, Herman G. Martin, was convicted of second degree murder (Pen. Code, § 187); conspiracy to commit extortion (Pen. Code, §§ 182.1 and 518); conspiracy to commit an assault with a deadly weapon

(Pen. Code §§ 182.1 and 245, subd. (a)); and simple assault (Pen. Code, § 240). The jury found, in conjunction with the three felony counts, that a principal was armed with a firearm (Pen. Code, § 12022, subd. (a)). (CT II 212-215, 308-309.)[1/]

Petitioner was sentenced to an indeterminate term of 15 years to life for the murder conviction, plus a one-year consecutive term for the firearm allegation. State prison sentences were stayed on the conspiracy counts and a concurrent sentence was imposed for the simple assault. (CT II 265-267.)

Petitioner appealed the judgment of conviction to the California

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1. The designation "CT" refers to the clerk's transcript prepared in conjunction with the state court appeal in this case. The designation "RT" refers to the reporter's transcript on appeal.

Court of Appeal, case number 4 Crim. 13945. Prior to decision, petitioner filed a petition for writ of habeas corpus in the Court of Appeal, case number 4 Crim. 15681. The appeal and writ were consolidated by the Court of Appeal and decided on December 23, 1983. In a published decision (In re Martin (1983) 150 Cal.App.3d 148), the Court of Appeal denied the writ and affirmed the conviction.

On February 6, 1984 petitioner filed a petition for hearing in the California Supreme Court, asking that court to review the judgment of conviction and the denial of his writ filed in the Court of Appeal. (Pen. Code, § 1506.)

On March 6, 1984 petitioner filed an "original" petition for writ of habeas corpus in the California

Supreme Court, case number Crim. 23573, presenting identical issues as those then pending on the petition for hearing in 4 Crim. 15681. The same documentary support (the appellate record from 4 Crim. 13945 plus various exhibits attached to the petitions themselves) were presented in both Crim. 23573 and 4 Crim. 15681. The only difference in the support presented to the California Supreme Court in Crim. 23573 was the addition of juror affidavits. (Petn. 9-10.)[2/] The affidavits provided evidence of the mental processes of the respective jurors and, therefore, could not have been considered by the

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2. The fact the Court of Appeal's opinion was attached to Crim. 23573 does not separate that case from 4 Crim. 15681. (Petn. 10.) The Court of Appeal's opinion was appended to the petition for hearing filed in 4 Crim. 15681.

California Supreme Court because such evidence is inadmissible under California law. (Evid. Code, § 1150, subd. (a); People v. Hutchinson (1969) 71 Cal.2d 342, 349; People v. Ozene (1972) 27 Cal.App.3d 905, 914.)

On April 19, 1984 the petition for writ of habeas corpus in Crim. 23573 was denied. (Appen. A.) On the same date, the petition for hearing in 4 Crim. 13945/15681 was denied. (Appen. C.)

B. Statement of Facts

The petition depends heavily on the facts in an attempt to justify relief. The statement of facts contained in the petition (at pp. 10-28) is a distortion of the appellate record upon which it purports to be based, and violates the fundamental legal principle that a reviewing court view the evidence

in the light most favorable to the judgment. (See Taylor v. Mississippi (1943) 319 U.S. 583, 585-586; People v. Reilly (1970) 3 Cal.3d 421, 425.) The following statement of facts is taken from the Court of Appeal's published opinion and more fairly represents the evidence presented to the jury.

> "La Jolla attorney Richard Crake was murdered by Andrew James Powell on May 12, 1981. The death was probably the result of a severe blow to the head. Briefly, in the light most favorable to the judgment, the evidence shows Martin and Crake were embroiled in civil litigation arising from a dispute over a real estate transaction at the Sports Arena Square shopping center. During the course of discovery Martin became dissatisfied with the posture of the litigation. During a deposition Martin had threatened Crake with violence.
>
> "Michelle Goff worked for Martin's insurance company. Powell was Goff's boyfriend and she introduced him to Martin. Martin hired Powell

on March 23, 1981. Martin knew Powell could not make his child support payments. Martin also knew Powell was afraid he would be jailed for failure to pay. Martin used this as leverage and told Powell he wanted Powell to collect money Crake owed Martin. Martin told Powell to collect $100,000 from Crake and to beat him up.

"Martin gave Powell Crake's picture and business address. When Powell would not go to Crake's business, Martin supplied Crake's home address. Powell and a friend went to this address but discovered Crake no longer lived there. Powell called Martin long distance to tell him this address was incorrect.

"Martin obtained Crake's new address by contacting United States Marshal James Murphy telling Murphy he needed the address to serve papers in conjunction with his civil suit. Murphy provided Martin with Crake's address. Martin gave this address to Powell along with the keys to Martin's car and a bag containing a gun.

"Powell and a friend drove to Crake's house on May 12, 1981. They arrived at the guard station at approximately

9 p.m. Powell gave the guard a false name. The Crake family had returned from dinner approximately 9 p.m. Powell and his friend rang the doorbell and Crake answered. Powell sent the friend to the car and then told Crake he was there to collect $100,000 for Martin. Powell and Crake got into a fight. Powell shot Crake in the arm with Martin's gun. Powell hit Crake in the head with the gun between six and sixteen times. The blows eventually caused Crake's death. Crake's wife attempted to stop Powell but he pushed her away and fired the gun at her. Crake's daughter threw shoes and books at Powell.

"Powell covered with blood returned to the friend's car. They drove to Powell's house where he made a toll call to Martin, telling him the dirty work was done. When Goff returned at 10 p.m. she found blood on the carpet, shoes in the bathtub, and blood on Powell's jacket. Powell disposed of the jacket and the gun in a nearby dumpster scheduled to be picked up the following morning." (In re Martin, supra, 150 Cal.App.3d at pp. 156-157.)

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied. The federal constitutional issues were never reached by the California Supreme Court because adequate and independent state grounds existed to deny the petition in the California Supreme Court. The issues presented below were identical to issues then pending in a separate proceeding in the California Supreme Court. Thus, the petition was defective because it was duplicative. The petition below was defective because it depended entirely on the facts, and petitioner had not presented the petition in the first instance in a court capable of resolving factual disputes. Furthermore, petitioner was foreclosed from raising the issue of witness intimidation on habeas corpus, since the issue was decided on

his direct appeal. Habeas corpus may not serve as a second appeal.

Petitioner's claim that the prosecution failed to provide him with discovery relevant to the credibility of prosecution witnesses is unworthy of certiorari. Petitioner does not challenge the legal standard by which this issue was judged in the lower courts. Rather, petitioner argues the factual determination made below was incorrect. Thus, certiorari is inappropriate because petitioner asks this Court to serve as a reviewer of the facts, not as an arbiter of federal constitutional law.

Finally, petitioner seeks review to resolve an apparent conflict in this Court's decisions concerning the standard of prejudice in a case where the prosecution has intimidated defense witnesses. Certiorari is not

appropriate since the conflict the petition alludes to is imaginary. Furthermore, this issue is not properly raised in this petition because the issue was resolved on direct appeal by the Court of Appeal. Moreover, even if the issue exists, this Court would have to engage in an extensive factual review to determine if the factual predicate for review is present in this case. If, as the California Court of Appeal found, the factual predicate is lacking, the issue of prejudice will not be presented by this case. Accordingly, certiorari is not justified in this case.

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ARGUMENT

I

CERTIORARI DOES NOT LIE WHEN, AS HERE, ADEQUATE AND INDEPENDENT STATE GROUNDS SUPPORT THE JUDGMENT

It is, of course, incumbent upon this Court to ascertain for itself whether a non-federal ground independently and adequately supports the judgment of the state court. (Abie State Bank v. Bryan (1931) 282 U.S. 765, 773.) Although this Court has announced a number of principles in order to help determine whether various forms of references to state law constitute adequate and independent state grounds, there is no consistent approach taken to resolve this issue. (Michigan v. Long (July 6, 1983) ___ U.S. ___ [77 L.Ed.2d 1201].)

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When there is a doubt whether it is proper for this Court to take jurisdiction over a case, the doubt should serve to deny jurisdiction. (Dixon v. Duffy (1952) 344 U.S. 143, 147 [Jackson, J. dissenting]; Lynch v. New York (1934) 293 U.S. 52.) An ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved. (Michigan v. Long, supra, 77 L.Ed.2d 1201.) In the case at bar, there is considerable doubt as to whether the California Supreme Court decided to deny the writ based on state procedural grounds or based on federal constitutional grounds.

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A. The Petition Presented to the California Supreme Court, As A Whole, Was Denied for Failure to Conform With State Procedures

It rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy. (Wolfe v. North Carolina (1960) 364 U.S. 177, 195.) It is impossible to determine with precision the basis upon which the writ in Crim. 23573 was denied, since the denial was without opinion. (Appen. A.)[3/] However, the petition filed in Crim. 23573 failed to conform

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3. The Ninth Circuit Court of Appeal has determined for the purposes of the exhaustion doctrine. If the denial of a habeas corpus petition does

with California procedural requirements, justifying denial of the petition on procedural grounds.

At the time Crim. 23573 was filed (Mar. 6, 1984) the identical issues were already pending before the California Supreme Court in the petition for hearing, filed in 4 Crim. 15681 on

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Footnote 3 continued:

not include the citation of authority by the California Supreme Court, the petition has been decided on the merits. (Harris v. Superior Court (9th Cir. 1974) 500 F.2d 1124, 1128-1129.) The Harris court did not point to any California authority in support of that proposition, nor has Harris been cited in published California opinions. Furthermore, the Harris shortcut may be appropriate for purposes of the exhaustion doctrine when an original petition for habeas corpus relief is filed in federal court, in order to give a petitioner a federal forum. However, using shortcuts is an inappropriate basis upon which to grant certiorari because of the scarce resources of this Court and the multitude of cases which are clearly within this Court's jurisdiction and worthy of review.

February 6, 1984. Under California law, a petitioner may seek review of his claim only one time. (In re Miller (1941) 17 Cal.2d 734, 735; accord, In re Rodriquez (1975) 14 Cal.3d 639, 654, fn. 18; In re Lynch (1972) 8 Cal.3d 410.) Thus, even though petitioner sought the California Supreme Court's "original" jurisdiction in Crim. 23573 under article VI, section 10 of the California Constitution, he failed to file an original petition. This procedural ground supports the denial of the writ.

Likewise, the nature of the writ filed in the California Supreme Court indicates it was denied for procedural reasons. Petitioner submitted the writ based on the trial record and submitted 26 additional exhibits, many of which were declarations of alleged witnesses. Though it had jurisdiction to

handle the writ, the California Supreme Court is a reviewing court, not designed to conduct evidentiary hearings. (In re Hochberg (1970) 2 Cal.3d 870, 873-874.) When relief has not previously been sought in a lower court, an appellate court may refuse the writ on the basis there has not been an application for relief made in a trial court. (In re Davis (1979) 25 Cal.3d 384, 389; In re Van Heflin (1976) 58 Cal.App.3d 131, 135; In re Hillery (1962) 202 Cal.App.2d 293.) In a case such as this, where the claim is intimately entwined with the facts, denial for failure to apply in the trial court is appropriate.

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B. California Law Prevents a Petitioner for Habeas Corpus Relief From Raising an Issue in a Petition That Was The Subject of a Direct Appeal

Petitioner claims that repeated acts of witness intimidation by the prosecution caused defense witness to invoke their privileges against self-incrimination and thereby denied petitioner a fair trial and due process. (Petn. 41-56.) Though raised in Crim. 23573, under California law, this issue was not properly before the California Supreme Court. Therefore, the issue is not properly presented to this Court.

The issue of witness intimidation was presented as an appellate issue to the California Court of Appeal, which resolved the issue in favor of the judgment. The Court of Appeal wrote:

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"Martin asserts prosecutorial misconduct because the prosecutor wilfully suppressed material evidence. This assertion is based on Martin's assumption the three defense witnesses who asserted their Fifth Amendment privileges did so because another defense witness was arrested. In People v. Ruthford (1975) 14 Cal.3d 399, 406, the court stated: '[W]hen the evidence which is suppressed or otherwise made unavailable to the defense by conduct attributable to the state bears directly on the question of guilt our initial inquiry is whether such conduct resulted in denial of a fair trial.' In this case there is no offer of proof nor evidence the witnesses' decision to not testify was based on any conduct attributable to the state. In fact when the court was advised of the defense witnesses' arrest, the court stated the arrest had 'nothing to do with this Court' although tactically it might have been 'best left undone.' Without conduct attributable to the prosecution there cannot be any wilfull suppression of evidence." (In re Martin (1983) 150 Cal.App.3d 148, 167; emphasis added.)

When presented with the intimidation issue in conjunction with the consolidated petition for writ of habeas corpus in 4 Crim. 15681, the Court of Appeal wrote:

> "The allegations in the petition for writ of habeas corpus concerning prosecutorial misconduct and witness intimidation have been dispensed with on the merits in the opinion on appeal. (See part V, above). A potential witness assertion of the Fifth Amendment privilege against self-incrimination is not conduct attributable to the prosecutor." (In re Martin, supra, 150 Cal.App.3d at p. 168; emphasis added.)

The Court of Appeal's determination of the intimidation issue in conjunction with petitioner's direct appeal, instead of his habeas corpus petition, is significant. It is settled in California that habeas corpus does not lie as a substitute for an appeal or

as a second appeal. (In re Terry (1971) 4 Cal.3d 911, 927; In re Eli (1969) 71 Cal.2d 214, 219.) It is only where the facts alleged indicate the accused has no opportunity to present his contentions at trial, or on appeal, that he may resort to a writ of habeas corpus. (In re Gomez (1973) 31 Cal.App.3d 728, 732.) Petitioner had every opportunity to present his claim of witness intimidation at trial and on appeal. The witnesses he claims were intimidated by the prosecution were obviously accessible to the defense. In fact, Charles Riley and Eugene Wallace asserted their Fifth Amendment privileges from the witness stand in open court. (Petn. 42-46.) Petitioner had an opportunity to explore their motives before the trial court. Yet, petitioner did not even present an offer of proof to show these witnesses

were intimidated by the prosecution. (Compare United States v. Hammond (5th Cir. 1979) 598 F.2d 1008, 1012-1013; United States v. Morrison (3d Cir. 1976) 535 F.2d 223, 225-228; United States v. Smith (D.C. Cir. 1973) 478 F.2d 976, 979.)

The issue of witness intimidation raised on direct appeal was based upon the record produced at the trial. By determining this issue on direct appeal instead of on the habeas corpus petition, the Court of Appeal necessarily rejected petitioner's claim that he was not provided an opportunity to present this issue at trial or on appeal.[4/] Therefore, the issue was not

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4. Petitioner's claim that he had "newly discovered evidence" which justified habeas corpus review on the witness intimidation issue was not persuasive to the Court of Appeal. (See In re Weber (1974) 11 Cal.3d 703, 706; In re Branch (1969) 70 Cal.2d 200, 213-214.)

properly presented to the Court of Appeal by way of habeas corpus.

Just as the Court of Appeal refused to grant petitioner a second appeal on the issue of witness intimidation, the California Supreme Court would not have reached that issue on the merits in Crim. 23573. Accordingly, the witness intimidation issue is not reviewable in this case by this Court. The proper avenue of review for this issue would have been by writ of certiorari from the direct appeal filed in 4 Crim. 13945. Petitioner has expressly avoided doing this. (Petn. 8.)

Because the denial of the writ by the California Supreme Court is supported by adequate and independent state

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grounds, respondent respectfully submits this Court should deny certiorari. (Michigan v. Long, supra, 77 L.Ed.2d 1201.)

II

CERTIORARI DOES NOT LIE WHEN, AS HERE, PETITIONER'S CLAIM OF CONSTITUTIONAL ERROR DEPENDS ON A REVIEW OF THE FACTS TO SEE IF THE STATE COURT'S FACTUAL FINDINGS WERE CORRECT

A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues, nor does it sit for the benefit of the particular litigants. (Rice v. Sioux City Cemetery (1955) 349 U.S. 70, 74.) Certiorari is not granted to review evidence and discuss specific

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facts. (United States v. Johnston (1925) 268 U.S. 220, 227.)

The issues presented by petitioner require an evaluation of the entire trial record to determine whether petitioner is entitled to a new trial. This Court should not be utilized to perform a function more appropriately handled by a lower court.

The first issue presented by petitioner is whether the prosecutor's failure to disclose information about the credibility of two prosecution witnesses constituted a material omission which required a new trial. (Petn. 29-40.) The standard by which omissions are judged is not challenged by the petition. Omissions are material, in the constitutional sense, if the evidence omitted would serve to create a reasonable doubt of guilt that did not

otherwise exist. (Smith v. Phillips (1982) 455 U.S. 209, 219; United States v. Agurs (1976) 427 U.S. 97, 112; Giglio v. United States (1972) 405 U.S. 150, 153-154.)[5/] In order to determine its materiality, an omission must be evaluated in the context of the entire record. (United States v. Agurs, supra, at pp. 112-113.)

To review the denial of the petition for writ of habeas corpus by the California Supreme Court in case number Crim. 23573, would require this

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5. The good faith or bad faith of the prosecutor is immaterial. The effect of misconduct, not the blameworthiness of the prosecutor, is the crucial inquiry for due process purposes. (Smith v. Phillips, supra, at p. 220, fn 10; Giglio v. United States, supra, at pp. 153-154.) The aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. (Smith v. Phillips, supra, at p. 219.)

Court to evaluate the claimed omissions in light of the entire trial record (including over 2,300 pages of reporter's transcript) and all the exhibits and documents which were before the California Supreme Court. (Petn., 7-10.) Such a review was conducted by the California Court of Appeal in 4 Crim. 15681 which assumed the truth of petitioner's allegations and found:

> "In this case the prosecutor had a duty to disclose to the court the misleading testimony of the prosecution witnesses. The prosecution's failure resulted in the suppression of substantial material evidence concerning the credibility of chief witnesses. Nonetheless we must evaluate whether this affected the outcome of the trial. We are satisfied that had the jury known the witnesses had been promised more lenient treatment in exchange for their cooperation, it would not have affected the verdict. Both witnesses faced severe penal sanctions and the district attorney's offer to intercede

> would only have changed the character of the sanctions. Both witnesses had other motives to testify. Both witnesses' testimony was corroborated by other direct testimony and circumstantial evidence." (In re Martin, supra, 150 Cal.App.3d at pp. 169-170; emphasis added.)

Petitioner does not ask this Court to review the Court of Appeal's determination to insure they applied the correct standard in the correct fashion. In fact, he is careful to point out he is not asking this Court to review the opinion from the Court of Appeal. (Petn. 8.) Rather, petitioner asks this Court to undertake an independent review of the record to determine if, under the facts of this case, the omissions claimed in his petition were material in the constitutional sense. Thus, this case presents a pure factual question for review in this Court. Questions of

fact are not properly the subject for review in this Court. (Grayson v. Harris (1925) 267 U.S. 352, 357-358.) Moreover, such review would be duplicative of the California Court of Appeal's effort and an inappropriate drain on this Court's scarce resources. Accordingly, the petition for writ of certiorari should be denied.

III

CERTIORARI SHOULD NOT BE GRANTED SINCE THERE IS NO CONFLICT IN THIS COURT'S CASES ON THE PROPER STANDARD OF PREJUDICE WHEN THERE HAS BEEN WITNESS INTIMIDATION BY THE PROSECUTION, NOR DOES THIS PETITION PROPERLY RAISE THE ISSUE

The second issue presented by the instant petition concerns the proper standard of prejudice to be applied where there has been intimidation of defense witnesses by the prosecution.

(Petn. 41-56.) To justify review, petitioner argues there is a conflict in this Court's opinions concerning the proper standard of review. (Petn. 55-56.) There is no conflict in the law. Furthermore, petitioner presents this Court with an academic exercise since the issue is not properly raised by this petition.

A. There is No Conflict in the Law

Certiorari should not be granted in this case because there is no conflict in this Court's cases on the proper standard of prejudice for witness intimidation. Petitioner contends the materiality requirement of United States v. Valenzuela-Bernal (1982) 458 U.S. 858, is in conflict with the reversible per se standard of Webb v. Texas (1972) 409 U.S. 95, and that this conflict justifies

review by this Court. (Petn. 55-56.) Petitioner's premise is incorrect. Webb did not establish a reversible per se rule.

In Webb, there was no discussion of the proper standard of review to be applied where a prospective defense witness was intimidated by the state. (Webb v. Texas, supra, 409 U.S. at p. 98.) Clearly, Webb did not create a reversible per se rule. This conclusion follows from United States v. Valenzuela-Bernal, supra, 458 U.S. 858, wherein this Court held there must be a reasonable likelihood the witness' testimony could have affected the judgment of the trier of fact. (Id., at pp. 872-874, applying the test applicable to cases involving the Due Process Clause of

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the Fifth Amendment; see Giglio v. United States, supra, 405 U.S. at p. 154.)[6/]

The dissent in Valenzuela-Bernal did not cite Webb to suggest a reversible per se standard applied on this issue, nor did the dissent attack the prejudice requirement set out in the majority opinion. (United States v. Valenzuela-Bernal, supra, 458 U.S. at pp. 879-885, (Brennan, J. dissenting).) Furthermore, this Court has never cited Webb in conjunction with this issue.

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6. As pointed out in footnote 5, supra, the good or bad faith of the prosecutor is immaterial to the prejudice determination. Petitioner relies on Freeman v. State of Georgia (5th Cir. 1979) 599 F.2d 65 to suggest bad faith justifies a different rule. (Petn. 49-51.) Petitioner's reliance on Freeman is misplaced. Freeman applied the same standard of error for the prosecution's bad faith conduct as this Court applied in Valenzuela-Bernal. (Freeman, supra, at pp. 69-70.)

This Court has consistently followed Valenzuela-Bernal to reverse cases wherein lower courts applied a standard of review akin to per se reversible error in witness intimidation cases. (United States v. Armijo-Martinez (1982) 459 U.S. 810 [669 F.2d 1131]; United States v. Marquez-Amaya (1982) 458 U.S. 1118, on remand, 686 F.2d 747.) Recently this Court has reaffirmed Valenzuela-Bernal's harmless error analysis in conjunction with the Sixth Amendment's right to counsel. (United States v. Cronic (May 14, 1984) ___ U.S. ___ [80 L.Ed.2d 657, 667].) The overwhelming bulk of authority supports application of the Valenzuela-Bernal rule on the issue of prejudice.

For the proposition that Webb created a per se reversible error rule,

petitioner cites United States v. McDonald (5th Cir. 1980) 620 F.2d 559, 564 and United States v. Hammond, supra, 598 F.2d 1008, 1013. (Petn. 55.) Both of these cases were decided prior to Valenzuela-Bernal. Accordingly, their reliance on Webb as creating a reversible per se standard is suspect. No conflict in the law currently exists. Therefore, the petition for writ of certiorari should be denied since there is no compelling legal issue presented to the Court.

B. Even Assuming A Conflict In the Law, This Petition Does Not Present the Issue of the Proper Standard of Review

As outlined above, the California Court of Appeal decided the issue of witness intimidation in petitioner's direct appeal, thereby

precluding the issue's consideration by way of habeas corpus in state court. (See Argument I (B), supra.) If the issue is worthy of review by this Court, that review must come in conjunction with the direct appeal. The issue is not properly before this Court in the present petition.

Furthermore, the issue is not worthy of review in this case because the issue of prejudice is not clearly presented. Before this Court could reach the prejudice issue, there would have to be a review of the entire record to determine, (1) if witnesses were, in fact, intimidated; (2) if so, was the intimidation the result of any conduct attributable to the prosecution; (3) if so, was the intimidation by the prosecution the result of misconduct (if, as petitioner contends, bad faith changes

the evaluation process); and (4) if all the above requirements have been met, was there prejudice. Petitioner raises an issue which depends on the specific facts of his case and requires a factual review by this Court.[7/]

Significantly, because this case requires this Court to make factual findings as a predicate to reaching the prejudice issue, it is possible the

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7. The California Court of Appeal engaged in a factual review of the appellate record and determined there was no showing of witness intimidation, nor was there any showing the assertion of the Fifth Amendment privilege by the witnesses was the result of "any conduct attributable to the state." (In re Martin, supra, 150 Cal.App.3d at p. 167; emphasis added.) Not only was there a finding there was no intimidation by the prosecution, there was a finding the assertion of the privilege was not attributable to any conduct by the prosecutor. Considering the scope of review below, for this Court to inject itself in this factual dispute would be an inappropriate waste of this Court's resources.

prejudice issue would not even be reached by this Court. A factual finding favorable to respondent (such as the finding made by the Cal. Court of Appeal) would prevent this Court from reaching the issue. Certiorari should not be granted on the chance an issue worthy of consideration might be presented.

The factual posture of this case is contrasted with Webb v. Texas, supra, 409 U.S. 95, and United States v. Valenzuela-Bernal, supra, 458 U.S. 858, the cases which petitioner contends create a conflict in the proper standard of error to be applied for improper witness intimidation. (Petn. 56.) In Webb, judge's comments to the prospective defense witness were part of the appellate record and the impact of the comments was evidence from the record.

(Webb v. Texas, supra, 409 U.S. at pp. 95-97.) No factual dispute was presented. Similarly, there was no factual issue presented in Valenzuela-Bernal. The government deported the prospective defense witnesses thereby making the witnesses unavailable to the defense. (United States v. Valenzuela-Bernal, supra, 458 U.S. at pp. 872-874.)[8/] In Webb and Valenzuela-Bernal, a constitutional issue was squarely presented. This petition does not squarely present a constitutional issue. At most, it presents a factual dispute. This Court is not the proper forum to air factual

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8. In Washington v. Texas (1967) 388 U.S. 14, another Sixth Amendment compulsory process case, petitioner was deprived of a defense witness by virtue of a Texas statute which made the witness incompetent to testify on behalf of petitioner. (Id., at pp. 22-23.)

disputes. (Rice v. Sioux City Cemetery, supra, 349 U.S. at p. 74; United States v. Johnston, supra, 268 U.S. at p. 227; Grayson v. Harris, supra, 267 U.S. at pp. 357-358.) Accordingly, the petition should be denied.

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CONCLUSION

For the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

STEVE WHITE,
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LOUIS R. HANOIAN,
Deputy Attorney General

Attorneys for Respondent

LRH:cl/bah
8/30/84
SD84US0002

APPENDIX A

ORDER DENYING WRIT

OF HABEAS CORPUS

Criminal No. 23573

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
APR 19, 1984
LAURENCE P. GILL, Clerk

Deputy

In re HERMAN G. MARTIN

on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

Bird, C.J. and Kaus , J., are of the opinion the petition should be granted.

BIRD

Chief Justice

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF CALIFORNIA

Art. VI, § 10

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.

Superior courts have original jurisdiction in all causes except those given by statute to other trial courts.

The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

CALIFORNIA EVIDENCE CODE

Section 1150.

(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

(b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict.

CALIFORNIA PENAL CODE

Section 1506.

An appeal may be taken to the court of appeal by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant or otherwise granting all or any part of the relief sought, in all criminal cases, excepting criminal cases where judgment of death has been rendered, and in such cases to the Supreme Court; and in all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court. Such appeal shall be taken and such application for hearing in the Supreme Court shall be made in accordance with rules to be laid down by the

Judicial Council. If the people appeal from an order granting the discharge or release of the defendant, or petition for hearing in either the court of appeal or the Supreme Court, the defendant shall be admitted to bail or released on his own recognizance or any other conditions which the court deems just and reasonable, subject to the same limitations, terms, and conditions which are applicable to, or may be imposed upon, a defendant who is awaiting trial. If the order grants relief other than a discharge or release from custody, the trial court or the court in which the appeal or petition for hearing is pending may, upon application by the people, in its discretion, and upon such conditions as it deems just stay the execution of the order pending final determination of the matter.

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

APR 19 1984

I have this day filed Order

No. S2DA0834

Entered by CC

Date Rec'd 4-23-84

HEARING DENIED Bird C.J.

[illegible] OF THE OPINION THAT PETITION SHOULD BE GRANTED.

In re: 4 Crim. *No.* 13945/15681

HERMAN G. MARTIN on habeas corpus

vs.

Respectfully,

Clerk

BEST AVAILABLE COPY

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

JOHN K. VAN DE KAMP
Attorney General of
the State of California
LOUIS R. HANOIAN
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

No: 83-2057
October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

THE PEOPLE OF THE STATE
OF CALIFORNIA

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF RESPONDENT IN OPPOSITION as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

Gerald B. Glazer
Emry James Allen
Attorneys at Law
660 J Street, #380
Sacramento, CA 95814

Edwin L. Miller, Jr.
District Attorney
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San Diego, CA 92112

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Clerk, Court of Appeal
Fourth Appellate District
Division One
1350 Front Street, Rm. 6010
San Diego, CA 92101

Robert D. Zumwalt
County Clerk
P.O. Box 128
San Diego, CA 92101

For Delivery to Hon. Donald W. Smith

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 11 day of September, 1984.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 11, 1984.

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 11th day of September, 1984.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986